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ABSTRACT

Teaching freedom of speech to undergraduates is a difficult task, in part as a result of the challenging history of free expression in the United States. The difficulty is compounded by the need to teach the topic, in contrast to indoctrinating the students in an ideology of free speech. The Bill of Rights, and specifically the First Amendment, appear simple and clear, but they are not as transparent as some have suggested. The First Amendment has been hard to interpret from its inception, and its meaning continues to evolve through numerous court cases. Despite claims to the contrary, American society has frequently failed to demonstrate a commitment to freedom of expression. Considering the sporadic and inconsistent history of free expression in America, teaching such a history is arduous. In light of this context, teachers of free expression must avoid the temptation to ground freedom of speech solely in historical claims. Laws such as the First Amendment can be reinterpreted by each succeeding generation, according to Thomas Jefferson. Accordingly, freedom of speech should be oriented more toward the future. Further, teachers should concentrate on the core principles justifying freedom of expression, while avoiding the various peripheral issues. Recently, for example, the legal code surrounding the First Amendment has expanded rapidly, rivaling that of the Internal Revenue Service. It is vital that teachers recognize the significance of First Amendment principles with the objective that students might be trained to avoid the intolerance that has often marked the American social scene. (Forty-eight footnotes are included.) (HB)

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TEACHING THE TYRANTS: PERSPECTIVES ON FREEDOM OF SPEECH AND UNDERGRADUATES

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TEACHING THE TYRANTS: PERSPECTIVES ON FREEDOM OF SPEECH AND UNDERGRADUATES

I must begin with a confession. My title is driven more by my frustration with the theme of this panel than by the thesis of my argument. My own experiences teaching undergraduates freedom of speech have been, in a word, disappointing. Once, when teaching a course on political communication, a student suggested that the government should simply ban "shallow" or "vapid" political rhetoric. I thought the solution a bit extreme, but a quick survey of the class revealed that a majority supported this solution. More recently I found myself engaged in a public argument about whether or not the media should be allowed to comment in any way on the private lives of public figures. This time, however, I found myself the sole champion of the free press as my students refused to believe that there was any value to the public disclosure of personal information. Most recently, this past summer, I taught a debate class which focused on the question of whether institutions of higher learning should regulate "hate" speech on campus. In the very first debate, a negative speaker made an impassioned plea that such limitations violated the first amendment. "Not to worry," the affirmative responded, "the first amendment isn't all that important."

Given this record, I was somewhat surprised when I was invited to participate on this program. My surprise, no doubt, gave rise to my title which reflects my belief that many of my students fail to share the admittedly passionate views instilled in me by teachers such as Franklyn Haiman and Nicholas Johnson about the importance of free speech in a democratic society. My own presuppositions now exposed, in the pages that follow I would like

to share some of my ideas about teaching freedom of speech. As will be evident from the outset, I believe that this is a difficult task. In part, this difficulty flows from the challenging history of free expression in the United States. The difficulty is compounded by the need to teach the topic, in contrast to indoctrinating the students in a ideology of free speech. I take up the some of these difficulties in the next section of this paper.

THE CHALLENGING HISTORY OF FREE SPEECH

The first ten amendments to the United States Constitution are commonly known as the "Bill of Rights." While this grand title sounds impressive, it creates an erroneous impression of the text to which it refers. It suggests that the first ten amendments to the Constitution clearly establish a set of freedoms and privileges guaranteed to all Americans. It suggests that there is a certain permanent quality about these protections; that these rights have a substance that can be touched. Moreover, it implies that the founders of the republic, through the process of amendment, were able to perfect and articulate a shared understanding of "freedom" which is durable enough to transcend time, bridging their age to eternity.

The problems associated with such images are obvious on close reading. The Bill of Rights does not define a set of perfectly understood and inalienable freedoms and privileges. Rather, it is a string of simple statements about rights which citizens may claim in disputes with the government. The actual protection afforded by these rights is vague and elusive, about as certain as a collection of proverbs. Nor were the founders of the republic able to arrive at a shared understanding of freedom. Oscar Handlin has observed that "the very circumstances of the adoption of the first ten amendments revealed that this was far from a comprehensive catalogue

of rights. The members of the first Congress who framed these sentences did not give much thought to what should be included or excluded; expediency and caprice played a large part in the ultimate decision."[1] Undoubtedly, most Americans in the late eighteenth century were committed to abstract rights of life, liberty, and happiness; but the specific manifestations of these beliefs were neither defined nor understood from the start. Rather, a shared understanding of what these rights actually mean, insofar as that is possible, developed over the life of this nation. These rights came to have meaning only as they were exercised, challenged, and negotiated.

This evolution is particularly evident with respect to the constitutional protections applicable to free expression. The pertinent guarantees are specified in the First Amendment to the United States Constitution which seems unequivocally and emphatically to proclaim that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2] In this single compound sentence, the Constitution defines the relationship between the government and the right of the people to criticize their government. Unfortunately, the meaning of the First Amendment is not as obvious as the words make it seem. While they appear eloquent, clear, and straightforward, they are not as transparent as some have suggested.[3]

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[1]Oscar Handlin, "Forward," in Leonard W. Levy, Jefferson and Civil Liberties: The Darker Side (New York: Quadrangle, 1973), p. v.

[2]United States Constitution, First Amendment.

[3]Justice Hugo Black once remarked: "The phrase 'Congress shall make no law' is composed of plain words, easily understood." Hugo Black, "The

The very simplicity of these words is deceptive, so unequivocal that they have become equivocal, because they create a set of rights so absolute that they must necessarily be limited.[4] Constitutional scholar and jurist Alexander Meiklejohn has noted that "though the intention of the Amendment is sharp and resolute, the sentence which expresses that intention is awkward and ill constructed."[5] Meiklejohn believed that the First Amendment was hard to write and is therefore hard to interpret. The words embody centuries of social passion and intellectual controversy. Meiklejohn claims that "one feels that its writers could not agree, either within themselves or with each other, upon a single formula which would define for them the paradoxical relationship between free men and their legislative agents."[6] The nature and extent of this relationship has developed only after two centuries of trying to understand the First Amendment in a variety of different contexts.

Bill of Rights," New York University Law Review 35 (1960): 874. Others have disagreed with this position. Meiklejohn has noted:

> But it may, I think, be taken for granted that the words 'abridging the freedom of speech, of the press; or of the right of the people peacefully to assemble, and to petition the Government for a redress of grievances' are not 'plain words, easily understood.' Together with such expressions as 'excessive fines' or 'cruel and unusual punishment' or 'due process of law,' they have been subject to 'much controversy.' We have inherited from the ages a bitter conflict over civil liberties.

Alexander Meiklejohn, "The First Amendment is Absolute," The Supreme Court Review, ed. Philip B. Kurland, 1970, p. 247.

[4]Alexis J. Anderson, "The Formative Period of First Amendment Theory, 1870-1915," The American Journal of Legal History 24 (1980): 56.

[5]Alexander Meiklejohn, "What Does the First Amendment Mean?" University of Chicago Law Review 20 (1953): 463.

[6]Meiklejohn, "What Does the First Amendment Mean?" p. 463.

This fact notwithstanding, we often predicate our teaching on the assumption that there has been a strong commitment to First Amendment freedoms throughout American history. "Significant Supreme Court enforcement and interpretation of the constitutional principle of freedom of speech and press," Lee Bollinger has observed, "really dates only to the second decade of this century."[7] This fact notwithstanding, prevailing historical and legal scholarship generally suggests that First Amendment freedoms have been zealously protected since the founding of this nation.[8] While First

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[7]Lee. C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (New York: Oxford University Press, 1986), p. 3.

[8]See, for example, any of the following works: James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell University Press, 1956); Dumas Malone, Jefferson and the Ordeal of Liberty (Boston: Little, Brown, 1962), and Thomas Jefferson as Political Leader (Berkeley and Los Angeles: University of California Press, 1963); Richard Buel, Jr., "Freedom of the Press in Revolutionary America: The Evolution of Libertarianism, 1769-1820," in The Press and the American Revolution, eds. Bernard Bailyn and John B. Hench (Boston: Northeastern University Press, 1981), pp. 59-98; Claude G. Bowers, "Jefferson and Civil Liberties," Atlantic Monthly 191 (January 1953): 52-58; Adrienne Koch, Jefferson and Madison: The Great Collaboration (New York: Oxford University Press, 1950); Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," William and Mary Quarterly 5 (1948): 145-176; James Mock and Cedric Larson, Words That Won the War: The Story of the Committee on Public Information, 1917-1919 (1939; reprint, New York: Russell & Russell, 1968); James Mock, Censorship 1917 (Princeton: Princeton University Press, 1941); H. C. Peterson and Gilbert Fite, Opponents of War, 1917-1918: The Story of the Persecution of Anti-War Groups (Madison: University of Wisconsin Press, 1957); Harold Hyman, Soldiers and Spruce: Origins of the Loyal Legion of Loggers and Lumberman (1959; reprint, Westport, Conn.: Greenwood, 1981); Harold Hyman, To Try Men's Souls: Loyalty Tests in American History (Berkeley: University of California Press, 1959); Thomas Lawrence, "Eclipse of Liberty: Civil Liberties in the United States During the First World War," Wayne Law Review 21 (November 1974): 33-112; Donald Johnson, "Wilson, Burleson, and Censorship in the First World War," Journal of Southern History 28 (February 1962): 46-58;

Amendment scholars acknowledge that there have been instances and periods in our history in which freedom of speech has been denied, these events are usually described as aberrations and blamed on some unscrupulous individual or group that was obviously out of step with American traditions, or on unique circumstances that strain even the strongest of convictions.

However, the claim to free speech and the reality of free speech in the United States often fail to correspond. Despite our persistent references to "tradition," we can identify many moments in history and examples in contemporary times where our society has failed to demonstrate a commitment to freedom of expression. Indeed, the history of the first amendment reveals that the emergence of a commitment to free expression

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Harry Scheiber, The Wilson Administration and Civil Liberties, 1917-1921 (Ithaca: Cornell University Press, 1960); Richard Longaker, The Presidency and Individual Liberty (Ithaca: Cornell University Press, 1961); Charles Chatfield, For Peace and Justice: Pacifism in America, 1914-1941 (Knoxville: University of Tennessee Press, 1971); Roland Marchand, The American Peace Movement and Social Reform, 1898-1918 (Princeton: Princeton University Press, 1972); William Preston, Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933 (Cambridge: Harvard University Press, 1963); Milton R. Konvitz, Expanding Liberties: Freedom's Gains in Postwar America (New York: Viking, 1966); Norman Thomas, The Test of Freedom (1954; reprint, Westport, Conn.: Greenwood, 1974); John Roche, The Quest for the Dream: The Development of Civil Rights and Human Relations in Modern America (New York: Macmillan, 1963); John D. Stevens, Shaping the First Amendment: The Development of Free Expression, vol. 11 of Sage CommText Series (Beverly Hills: Sage, 1982); Ora A. Hilton, "Public Opinion and Civil Liberties in Wartime, 1917-1919," Southwestern Social Science Quarterly 28 (December 1947): 201-222, and "Freedom of the Press in Wartime, 1917-1919," Southwestern Social Science Quarterly 28 (March 1948): 346-361; Paul L. Murphy, The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR (Westport, Conn.: Greenwood, 1972); Edward S. Corwin, Total War and the Constitution (New York: Knopf, 1947); and Corliss Lamont, Freedom Is As Freedom Does: Civil Liberties in America (New York: Horizon, 1981).

has not been an ordered linear progression, but rather has been a sporadic and inconsistent movement toward greater protection.[9] We have progressed and regressed, constantly changing our estimation of the importance of such expression. At times such expression has been tolerated and even encouraged, and other times it has been firmly and systematically suppressed.

TEACHING FREE SPEECH

When considered in such a context, it becomes apparent that the teacher of free expression has a troubled path to follow. There is no single unified theory of the first amendment nor is there a shared history of what the first amendment meant in previous times. Moreover, there are powerful arguments that are often made by responsible and well-meaning individuals to justify the suppression of speech. Given all this, I suggest that we must carefully consider the way in which we approach teaching the First Amendment. In the pages that follow, I would like to consider two of what I believe are the more important implications of such assumptions for teachers of free expression. First, I believe that we must avoid the temptation to ground freedom of speech solely in historical claims. Accordingly, I advocate a view of freedom of speech oriented toward the future. Second, I believe that we should concentrate heavily on the importance of the core principles justifying freedom of expression. An understanding of these principles, I believe, is vital to teaching students to appreciate the importance of freedom of speech.

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[9]This position is eloquently developed in David Kairys, "Freedom of Speech," in The Politics of Law: A Progressive Critique, ed. David Kairys (New York: Pantheon, 1982), pp. 140-171.

A Forward-Looking Constitution

It is difficult to know for certain what the framers meant when they fashioned the First Amendment.[10] The First Amendment, if we are candid with ourselves, might not have been intended as a libertarian statement designed to protect every speaker and every utterance. This realization, however, should not deter us from teaching the importance of free expression. Even if the framers had only a limited commitment to freedom of expression, the Amendment which they drafted is boldly stated. Rather than dwelling on the meaning which they may have intended, we should concentrate on determining a meaning that is relevant to our own times. We should, as Levy argues, avoid the temptation to go "forward while facing backwards."[11] Rather than grounding a commitment to First Amendment freedoms "on the fictitious pretense that they have always existed" with "arguments that are concocted to give to the fiction the appearance of both reality and legality," we should make a positive case for such freedoms.[12] Such a course would recognize the structure of the media, the nature of our society, and the potential for new technologies. It would be less concerned with what the First Amendment once meant, and more concerned with making it relevant to new situations.

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[10]See Richard A. Parker, "Revising Revisionist History: Consensus Theories of the Framers' Intent," Free Speech Yearbook 26 (1987): 1-10.

[11]Levy, Emergence of a Free Press (New York: Oxford University Press, 1985), p. 348.

[12]Levy, Emergence of a Free Press, p. 348.

To my thinking, the brilliance of the framers lies not in their understanding of or commitment to free speech, but rather in their conception of the Constitution. The Constitution they wrote is not a complex codification of rules and regulations, but rather a set of principles which John Marshall claimed were "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[13] If these principles are to have meaning we must apply them to the present irrespective of how they may have been construed in the past. Writing in 1789, Jefferson eloquently argued that "the earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct."[14] Each generation, according to Jefferson, must create its own conception of the Constitution because the "constitution and the laws of their predecessors extinguished them, in their natural course, with those who gave them meaning."[15]

Just as Jefferson believed that each generation must create its own Constitution, we must create our own First Amendment. There are many First Amendment problems which command our attention. In resolving these problems we must avoid the temptation to look backward as we move forward. Jefferson explicitly recognized this when he wrote that "some men look at constitutions with sanctimonious reverence, and deem them, like the

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[13]John Marshall, quoted by James Craig Martin, "Why the Constitution Works?" ABA Journal 73 (September 1987): 80.

[14]Jefferson to James Madison, 6 September 1789, in Thomas Jefferson: Writings, ed. Merrill D. Peterson (New York: Library of America, 1984), p. 80.

[15]Jefferson to Madison, p. 80.

ark of the covenant, too sacred to be touched."[16] Such reasoning provides "men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment."[17] Jefferson rejected such a notion because he believed that laws and constitutions must go hand in hand with the progress of the human mind. He concluded that the human mind "becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manner and opinions with the change of circumstances, institutions must advance also, and keep pace with the times."[18] This theme was reiterated by one of the most influential of modern jurists, Felix Frankfurter, who argued that great concepts like liberty were purposely left to gather meaning from experience "for they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."[19]

To justify freedom of expression, we must recognize the unique nature of our own times and realize that the First Amendment must change to account for new conditions. The strongest case for freedom of expression lies not in histories or legal treatises; rather, it lies in our belief that such freedoms are relevant to our times. While it is intellectually convenient and ideologically comforting to justify the First Amendment by appeals to the founders, history, or the courts, such appeals confuse reality and illusion.

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[16]Jefferson, quoted by Martin, p. 80.

[17]Jefferson, quoted by Martin, p. 80.

[18]Jefferson, quoted by Martin, p. 80.

[19]National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949).

This is not to say, however, that the past is unimportant. Ignoring the past would surely wreak havoc on the present. Meanings that have been ascribed to a constitutional provision cannot help but be a function in part of the intentions of the framers and the intentions of the contemporary interpreters. There is a crucial difference, however, between respect for the past that takes the form of mindless adherence to the supposed intentions of the framers and respect for the past in the form of appreciation for the value of continuity, stability, and tradition.

The Importance of Core Principles

At this point it should be obvious that our First Amendment freedoms are considerably more tenuous than one might suppose. The right to criticize the government, for example, is the result of a gradual transition to tolerance.[20] The legislature has grown less concerned with tyranny of the minority and much more concerned with tyranny of the majority. Consequently, speech which would not have been tolerated throughout the eighteenth, nineteenth, and early twentieth century is now protected by the First Amendment. This new-found tolerance is often supported by ideological histories which stress the protection that has been afforded to such critical expression throughout history and by the courts which have developed judicial formulae which afford some measure of protection to such speech. All of this is to protect expression that is properly regarded as constituting the archetype of speech that should be protected by the First Amendment.

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[20]My understanding of tolerance has been greatly influenced by the work of Bollinger.

Before progressing any farther, it seems necessary to stop and distinguish between some of the different types of speech that are protected by the First Amendment. If we remember that the First Amendment was intended as a means of protecting criticism of the form or policies of government then it becomes easy to distinguish between the core rights protected by the First Amendment and the periphery.[21] Consequently, core commitments would include some combination of the following claims: government cannot utilize prior restraints except in the most extreme of situations;[22] government cannot employ coercive measures to shape the content of news coverage;[23] political communication cannot be restricted because it defames the government or government officials;[24] access to public forums cannot be denied on account of the speaker's message;[25] and

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[21]The distinction between the core and the periphery is made by any number of authors. I am particularly sympathetic to Blasi's method of distinguishing between core and peripheral speech. I also rely heavily on Blasi for my legal citations supporting this distinction. See Vincent Blasi, "The Pathological Perspective and the First Amendment," Columbia Law Review 85 (April 1985): 459-466. See also Robert H. Bork, "Neutral Principles and Some First Amendment Problems," Indiana Law Journal 47 (Fall 1971): 1-35.

[22]See Near v. Minnesota ex rel Olson, 283 U.S. 697 (1931).

[23]See Landmark Communications v. Virginia, 435 U.S. 829 (1978); Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); and Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974).

[24]See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Cohen v. California, 403 U.S. 15 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); and Terminiello v. Chicago, 337 U.S. 1 (1949).

[25]See United States v. Grace, 461 U.S. 171 (1983); Heffron v. International Society for Krishna Consciousness, 452 U.S. 60 (1981); and Edwards v. South Carolina, 372 U.S. 229 (1963).

the government cannot punish citizens for their beliefs.[26] Many of these commitments have gained acceptance only after years of debate, and in fact, some of these commitments are still qualified or limited in certain instances.

Although we might personally find these core principles laudable, history has shown that our society has a tendency toward intolerance. Not coincidentally, this tendency is directly related to the threats facing the existing order. Whenever the government is challenged by events in foreign lands, this tendency manifests itself in legislation restricting extremist speech. Whenever the existing social order is challenged, states, localities, and even individual citizens tend to lash out at objectionable speech. Thus, the real problem for those who advocate First Amendment freedoms is inculcating tolerance in the population. This is no easy argumentative task, for as Justice Holmes noted in *Abrams v. United States*, "persecution for the expression of opinions seems to me perfectly logical."[27] If the powers that be are absolutely convinced that they are correct, Holmes continued, it makes sense that they would naturally express their wishes in law and "sweep away all opposition."[28] Walter Bagehot has insightfully observed that

> persons of strong opinion wish, above other things, to propagate those opinions. They find close at hand what seems an immense engine for that propagation; they find the State, which has had a great and undeniable influence in helping some and hindering others--and in their eagerness they can hardly understand why they should not make use of this great engine

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[26]See Brandenberg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969); and Yates v. United States, 354 U.S. 298 (1957).

[27]Abrams v. United States, 250 U.S. 616, 630 (1919).

[28]Abrams , 250 U.S. at 630.

> to crush the errors which they hate, and to replace them with the tenets they approve."[29]

This pressure is magnified when the speech can be conceived as threatening democracy. In perhaps the ultimate of ironies, history has demonstrated that society is all too willing to destroy democracy to save democracy.[30]

To counter this tendency, it is necessary to create a feeling of tolerance in both the people and their government. This can be accomplished only if we are able to demonstrate that First Amendment freedoms are in the best interest of all parties. Without such a long-term commitment, society can never be expected to show tolerance in the face of threats. In an oft quoted passage, Judge Learned Hand wonders

> whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[31]

This sort of faith requires society to adhere to a few central First Amendment principles. Without such principles, the First Amendment is especially susceptible to challenge.

The problem is that such core principles are in a state of flux. In recent years the First Amendment has been invoked to justify protecting a wide

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[29]Walter Bagehot, "The Metaphysical Basis of Toleration," in The Works and Life of Walter Bagehot, vol. 6 (New York: Longmans, Green, 1915), p. 220.

[30]See Bollinger, p. 237.

[31]Learned Hand, The Spirit of Liberty, 3rd ed. (New York: Atheneum, 1963), pp. 119-120.

range of speech and a host of actions.[32] The First Amendment, for example, now limits campaign contributions[33] and prohibits patronage dismissals;[34] it protects pornography[35] and defamation;[36] it applies to billboards,[37] nude dancing,[38] jacket patches,[39] and license plates;[40] it protects school children,[41] prisoners,[42] and corporations.[43] While we might applaud such efforts to expand the scope of First Amendment freedoms, such gains have not come without cost. In the effort to expand the scope of First Amendment freedoms, legal scholars and court justices have created a scheme of differential

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[32]This list of cases relies heavily on Robert F. Nagel, "How Useful is Judicial Review in Free Speech Cases?" Cornell Law Review 69 (1984): 302-303.

[33]See Buckley v. Valeo, 424 U.S. 1 (1976).

[34]See Branti v. Finkel, 445 U.S. 507 (1980); and Elrod v. Burns, 427 U.S. 347 (1976).

[35]See Miller v. California, 413 U.S. 15 (1973).

[36]See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[37]See Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[38]See Schad v. Mount Ephraim, 452 U.S. 61 (1981); and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

[39]See Cohen v. California, 403 U.S. 15 (1971).

[40]See Wooley v. Maynard, 430 U.S. 705 (1977).

[41]See Board of Education v. Pico, 457 U.S. 853 (1982); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[42]See Procunier v. Martinez, 416 U.S. 396 (1974).

[43]See First National Bank v. Bellotti, 435 U.S. 765 (1978).

protection based on the application of complex situational tests.[44] Vincent Blasi has observed that the Court has adopted a host of complex legal formulae such as "a multi-factor balancing test, a multi-state analysis with a threshold level-of-scrutiny determination, or a standard that is highly dependent on particularistic assessments of motive, risk, or efficiency."[45] He concluded that that "doctrinal idiom abounds with talk of levels of scrutiny and ambits of protection."[46] Frederick Schauer has lamented that in the process of fashioning such protections the First Amendment has come to rival the Internal Revenue Code in its complexity.[47]

Our challenge, as teachers of the First Amendment is to identify and teach core principles that establish the importance of free speech as a principle. This requires us to go beyond issues in the immediate case to reach the larger issues. In the words of Bollinger:

> Free Speech is too vital a national symbol to be thought about exclusively in doctrinal terms. Devising a test for deciding who is a "public figure" for purposes of the constitutional standards regarding libel, or what is "obscene" for purposes of the exception for pornography, is unquestionably important. But we also need to look at how the concept of free speech affects social decision making beyond the ken of legal restraints on speech, because that larger connection appears to fuel the meaning, or at least a significant part of the meaning, of the principle itself.[48]

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[44]See Central Hudson Gas & Electric Co. v. Public Service Commission, 447 U.S. 557 (1980).

[45]Blasi, p. 473.

[46]Blasi, p. 471.

[47]See Frederick Schauer, "Codifying the First Amendment: New York v. Ferber," Supreme Court Review, ed. Philip B. Kurland, 1982, p. 309.

[48]Bollinger, p. 248.

Identifying and teaching free speech from the core, I believe, best teaches our students to appreciate the importance of speech in a liberal society.

CONCLUDING THOUGHTS

There can be little doubt but that all of us here assembled, as teachers of free speech, recognize the important function of expression in our society. While we may differ ideologically or even practically about how our commitment to speech should play out in the political realm, all of us know that we are benefited by a society that recognizes the value of speech. I believe that the best way to teach free speech is to avoid an orientation grounded solely in the past or in extended legal doctrine. Accordingly, in this paper I have argued the importance of a forward looking constitution and of a commitment to core principles. I believe it is vital that we recognize the significance of First Amendment principles--not because they were once important, but rather because they are important now. Further, when we argue for these principles, we should realize that the best argument for freedom of speech is grounded in the realization that such freedom is important for its own sake and not because it facilitates the resolution of a particular controversy.